IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.95 OF 1987

Vishnu Bhikaji Kakade & another ...Appellants

Vs.

Dhondabai Dinkar Kakade & Ors. ...Respondents

Mr R.R.Bhonsale for the Appellants
Mr.P.K.Dhakephalkar for Respondent No.2

CORAM: A.S.OKA,J.
DATE : FEBRUARY 24, 2005.

ORAL JUDGMENT:

1. Heard Counsel appearing for the parties. On 23rd February 1987 the Second Appeal was admitted by passing the following order :

"Admit. Notice on the question whether this suit is barred by res judicata ?"

2. I have heard the Counsel appearing for the parties on the substantial question of law indicated in the said order. The suit is filed by the Appellants/Plaintiffs for declaration that the Judgment and Decree passed in Regular Civil Appeal no.87 of 1985 was bad in law and nullity. There is a consequential prayer made in the suit for mandatory injunction enjoining the Respondents to dismantle the building erected by them on the suit property and hand over vacant possession thereof. There is also a prayer for removal of stone wall. The case of the Appellants is that in the year 1971, the Respondents started construction of a house on property owned

by them. Therefore, R.C.S.No.174 of 1971 was filed by the Appellants for perpetual injunction against the Respondents. The said suit was decreed. The Respondents preferred a Civil Appeal No.87 of 1985 in the District Court. The said Appeal was allowed and the decree passed by the Trial Court was upset. A case made out in the present suit is that the after Appeal No.87 of 1985 was decided, the Appellants have got the property surveyed from a retired surveyor. The said survey shows that the Respondents have encroached upon the property of the Appellants. It is stated that the measurements of the suit property referred to in the Judgment delivered in Regular Civil Appeal No.87 of 1985 are erroneous.

3. The Trial Court framed only one issue of bar of res judicata and decided the same against the Appellants. Therefore, the suit was dismissed. The Appeal preferred by the Appellants herein which was also dismissed by the Appellate court.

4. The learned Counsel for the Appellant submitted that the challenge in the suit was to the Decree passed in Appeal in the District Court on the ground that the same was illegal and was required to be set aside. Therefore, plea of res judicata was not available to the Respondents. He submitted that the courts below could not have dismissed the suit filed by the Appellant on the ground that the same was barred by res judicata. He submitted that there are other contentions

raised in the suit. When the correct measurements of the suit property were established, the Trial Court could have granted other prayers regarding removal of encroachment. The learned Counsel for the Respondent No.2 has supported the impugned Judgment and Decree.

5. While deciding the issue of res judicata, the Trial Court held that no case of fraud was pleaded by the Appellants. It was not their case that decree of the Appellate Court in earlier Appeal was vitiated by fraud. It is also held that the decree was passed by the Court having jurisdiction.

6. The Appellate Court has held that the decree passed in Civil Appeal No.87 of 1985 has attained finality and in absence of any case that the decree was obtained by fraud or the Court had passed the decree which is without jurisdiction, the said decree was binding on the parties. Apart from considering the finding of the Trial Court on the issue of res judicata the Appellate Court confirmed the decree of the Trial Court on the said ground. In my view the said finding is correct. The decree passed by the Appellate Court in Regular Civil Appeal No.87 of 1985 had attained finality. It could not have been challenged only on the ground that erroneous measurements were considered by the Appellate Court.

7. Other prayers which are made in the plaint are obviously consequential prayers and the said prayers cannot be granted

unless the Appellants succeed in obtaining substantive relief as prayed for.

8. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

JUDGE.